Nos. 94-1893 and 94-1900

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF VIRGINIA, ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

BELL ATLANTIC CORPORATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUGGESTION OF MOOTNESS

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On December 6, 1995, the Court heard oral argument in these cases, presenting a First Amendment challenge to 47 U.S.C. 533(b), which prohibits local exchange carriers (LECs) from operating cable

television systems within their service areas. On February 8, 1996, the President signed into law the Telecommunications Act of 1996, which, among other things, repeals Section 533(b). See Pub. L. No. 104-104, § 302(b) (1996). Section 302(b)(1) specifically states that "[s]ubsection (b) of Section 613 (47 U.S.C. 533(b)) is repealed." The legislation does not contain any specific effective date applicable to that repealing provision, and so it took effect on the date of the President's signature. See *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

Because the provision under challenge in these cases has been repealed, the cases are now moot. *Burke* v. *Barnes*, 479 U.S. 361, 363-364 (1987); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). The complaint in these cases requested a declaration that Section 533(b) is unconstitutional and an injunction against its enforcement; the plaintiffs did not request damages or any other relief based on past enforcement of the repealed provision. J.A. 16. Therefore, former Section 533(b) has no further, continuing effect on the parties before the Court.

Under the Communications Act of 1934, as now amended by the Telecommunications Act of 1996, no provision prevents a LEC from establishing a new cable system, in competition with the incumbent cable operator, in its own service area. Section 302(a) of the Telecommunications Act of 1996 does contain some restrictions on acquisition of incumbent cable operators by LECs. Under a new Section 652 of the Communications Act, no LEC or its affiliate may acquire more than a 10% financial interest in any incumbent cable operator offering cable service in its service area; conversely, no cable operator may acquire a similar financial interest in any LEC offering

local telephone service within its franchise area. The new legislation also provides several exceptions to these restrictions on acquisitions, for small cable systems, and for cable systems operating in nonurban areas; in addition, a LEC may acquire a cable system in its service area if (among other things) the cable system is not in the top 25 television markets, the market is served by more than one cable operator, and the subject cable operator is not the one with the most subscribers in the market. The legislation further authorizes the FCC to waive the restriction on acquisitions of incumbent cable operators by LECs under certain circumstances. Those provisions (which, of course, have not yet been considered by any court) are not at issue in the cases presently before the Court, and so they do not prevent the cases from becoming moot as a result of the enactment of the 1996 Telecommunications Act.

Because the provision under challenge has been repealed, these cases are now moot. The proper course is for the Court to vacate the judgment of the court of appeals and to remand the cases, with instructions to dismiss them as moot. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950); *Preiser* v. *Newkirk*, 422 U.S. 395 (1975); *Burke* v. *Barnes*, 479 U.S. at 365.

For the foregoing reasons, the judgment of the court of appeals should be vacated, and these cases should be remanded with instructions to dismiss them as moot.

Respectfully submitted.

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